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Supreme Court, U.S.
FILED

97 • 537 SEP 25 1997

No. 97-____ OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

FRANCISCO LOPEZ,

Petitioner,

v.

GAY C. RICCA-STROUD,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a court of appeals has jurisdiction to review a district court decision remanding a case to a bankruptcy court for further proceedings, when the bankruptcy court decision was final and the appeal would determine a legal issue that could make the remand unnecessary?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the United States Court of Appeals for the Seventh Circuit were Dr. Francisco Lopez as Defendant-Appellant and Gay C. Ricca-Stroud as Plaintiff-Appellee.

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1 *Collier on Bankruptcy* ¶ 3.03[6][b] (Lawrence P. King, ed., 15th ed. 1992) 9
1 *Collier on Bankruptcy* ¶ 5.09[1] (Lawrence P. King, ed., 15th ed. rev. 1997) 8, 14
John P. Hennigan, Jr., *Toward Regularizing Appealability in Bankruptcy*, 12 Bankr. Dev. J. 583 (1996) 8
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Joseph Mitzel, Note, *When is an Order Final?: A Result-Oriented Approach to the Finality Requirement for Bankruptcy Appeals to Federal Circuit Courts*, 74 Minn. L. Rev. 1337 (1990) 8, 14
1 William L. Norton, Jr., *Norton Bankruptcy Law and Practice* § 17.01 (1991) 7
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16 Charles Alan Wright *et al.*, *Federal Practice and Procedure* § 3926.2 (2d ed. 1996) 8, 10, 17

PETITION FOR A WRIT OF CERTIORARI

Dr. Francisco Lopez petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The court of appeals' opinion (Pet. App. 1a) is reported at 116 F.3d 1191. The district court's opinion remanding in relevant part (Pet. App. 7a) is reported at 201 B.R. 943. The district court's opinion denying rehearing (Pet. App. 16a), the bankruptcy court's order granting a discharge (Pet. App. 19a), and the bankruptcy court's oral opinion supporting its order (Pet. App. 20a) are all unreported.

JURISDICTION

The court of appeals' judgment was entered on June 27, 1997. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

The statutory provisions at issue, 28 U.S.C. § 158 (1988 & Supp. V 1993),[1] and 28 U.S.C. § 1291 (1994), are set forth in the appendix. Pet. App. 25a-26a.

STATEMENT OF THE CASE

The case presents an important and recurring question about appellate bankruptcy jurisdiction that has split the circuits since soon after Congress passed the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549. The bankruptcy appellate jurisdiction statute, 28 U.S.C. § 158(d), provides courts of appeals with jurisdiction over "appeals from all final decisions, judgments, orders, and decrees entered" by district courts (or

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[1] The version of Section 158 in effect at the time this case was filed is set forth in the appendix. It was amended in 1994, *see* Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, Title I, § 104(c), 108 Stat. 4106, 4109-4110, but the pertinent subsection was unchanged by the 1994 amendments.

bankruptcy appeals panels) sitting as appeals courts in bankruptcy. Likewise, the general appellate jurisdiction statute, 28 U.S.C. § 1291, provides courts of appeals with jurisdiction over "all final decisions of the district courts."[2] This case presents the following question: when a district court reviews a bankruptcy court's final decision and remands to the bankruptcy court for further proceedings, whether there can be a "final decision" that the court of appeals has jurisdiction to review.

In an opinion by Chief Judge Posner below, the Seventh Circuit applied the majority rule. The court ruled that a district court's decision remanding a matter to a bankruptcy court is not final, and so not appealable, if the remand requires the bankruptcy court to take any actions that go beyond the ministerial. Pet. App. 1a. The Seventh Circuit disagreed with the decisions by other circuits that would allow a more flexible approach to jurisdiction. *Id.* at 3a. Chief Judge Posner then wrote to "invite the Supreme Court's attention to a persistent circuit split that only the Supreme Court can heal." *Id.* at 1a.

1. Petitioner Dr. Francisco Lopez filed for bankruptcy under Chapter 7 of the Bankruptcy Code, 11 U.S.C. §§ 701-766, in November 1993. The United States District Court for the Northern District of Illinois had jurisdiction under 28 U.S.C. § 1334; venue was proper under 28 U.S.C. § 1408; and the case was referred to the Bankruptcy Court under 28 U.S.C. § 157(a).

Under Chapter 7, if the court granted Dr. Lopez a discharge, then Dr. Lopez would be released from liability for certain debts. *See* 11 U.S.C. §§ 507, 522, 726. Creditors could not further seek to hold Dr. Lopez liable for the discharged debts. *See* 11 U.S.C. §§ 524, 727(b). Nor could creditors assert a claim against his future earnings. *See* 11 U.S.C. § 541(a)(6). On the other hand, if a discharge were denied, Dr. Lopez still would be

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[2] Sections 158(d) and 1291 overlap, with either providing jurisdiction over final decisions by district courts sitting as appeals courts in bankruptcy. *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992).

indebted to all of his creditors, and they could seek to have their debts satisfied out of his future earnings.

Respondent Gay C. Ricca-Stroud, a creditor, opposed Dr. Lopez's bankruptcy discharge and filed an adversary proceeding seeking to deny the discharge on the grounds that he had failed to disclose or significantly undervalued assets on his bankruptcy schedules. Ms. Ricca-Stroud invoked 11 U.S.C. § 727(a)(4)(A), which provides that the debtor is entitled to a discharge unless he "knowingly and fraudulently, in or in connection with the case . . . made a false oath or account." Pertinent here, Dr. Lopez had placed a $500 liquidation value on his medical practice, and Ms. Ricca-Stroud alleged this was a knowing and fraudulent false oath because the value of the practice far exceeded this figure. In preparing his schedules, Dr. Lopez relied on experts who valued the practice on the assumption that the trustee who would be assigned to administer Dr. Lopez's bankruptcy estate could sell the stock in Dr. Lopez's medical corporation to a third party. In that case, Dr. Lopez would leave the corporation and start a separate practice as he was entitled to do because 11 U.S.C. § 541(a)(6) exempts future earnings from the property of the estate. Accordingly, Dr. Lopez's advisor valued the stock at its liquidation value, which was negligible because the corporation's liabilities far exceeded its assets. Ms. Ricca-Stroud's expert, on the other hand, assumed that Dr. Lopez would participate in the transition of the practice to a new owner.

The bankruptcy court found that Dr. Lopez had not knowingly and fraudulently made a false oath about his medical practice's value and thus granted the discharge. *See* Pet. App. 19a, 23a. Over parts of three days, the bankruptcy court had taken evidence about the possible ways to value a medical practice and how those methods would apply in different scenarios, including one in which the business would not continue as a going concern and Dr. Lopez would leave the practice. The court found that Dr. Lopez would not continue to work for the corporation after bankruptcy should the trustee sell the stock and that the

corporation could not continue as a going concern after bankruptcy without Dr. Lopez. *Id.* at 22a.

Under the circumstances, the court found that Dr. Lopez did not have the intent to knowingly and fraudulently undervalue his practice:

> The Court also feels that it has not been established that Dr. Lopez knowingly and fraudulently made any false oath or account. The Court is satisfied that Dr. Lopez is a credible witness who left the details of his business [—] and I don't find that this was reckless conduct on behalf of Dr. Lopez [—] to his staff and to his lawyers to make these valuations that he accepted and signed for.

Id. at 23a.

2. Ms. Ricca-Stroud then appealed to the United States District Court for the Northern District of Illinois. The district court indisputably had jurisdiction over Ms. Ricca-Stroud's appeal because the bankruptcy court's decision was final. 28 U.S.C. § 158(a).

On appeal, the district court remanded for further proceedings. The district court ruled that an intervening Seventh Circuit decision, *In re Prince*, 85 F.3d 314 (7th Cir.), *cert. denied*, 117 S. Ct. 608 (1996), had established the proper valuation procedure for a medical practice. Pet App. 10a-12a. The district court remanded for the bankruptcy court to develop facts regarding the valuation, specifically:

> First, [the bankruptcy court] must decide whether Dr. Lopez' medical corporation could continue as a going concern. Second, if the corporation could continue as a going concern, it must determine what the present value of the stock would be given the probability of any future events and their impact on the value of the stock.

Pet. App. 11a-12a. The court noted, "if the facts demonstrate that Dr. Lopez intended to continue to work for or operate the

corporation as a going concern, then the veracity of his oath may be in doubt." *Id.* at 12a n.2.

But at the same time the district court, while noting that Dr. Lopez's valuations might have been wrong, apparently affirmed the bankruptcy court's findings on the central issue in the case: Dr. Lopez's intent. According to the district court, the record showed that Dr. Lopez was a credible witness on this matter. The court affirmed the finding that Dr. Lopez was justified in relying upon experts to value his medical practice. Pet. App. 12a-13a. Indeed, the district court held, "[Dr. Lopez] lacks the basic knowledge, let alone expertise, necessary to dispute the calculations." *Id.* at 13a. Hence, the district court held that "the record supports the bankruptcy court's factual findings and credibility determination with regard to the truthfulness of Dr. Lopez' oaths and his lack of reckless intent." *Id.*

3. The district court then denied Dr. Lopez's motion for rehearing. In so doing, it reiterated that the bankruptcy court had to consider the valuation method described in *In re Prince*. The district court instructed the bankruptcy court to consider whether Dr. Lopez's medical practice could continue as a going concern, even though the bankruptcy court had already addressed and decided this issue. Pet. App. 17a. While the district court noted that Dr. Lopez had already testified on this point, saying that he would not keep working for his medical corporation if it were sold, the court felt that he had not been fully cross-examined, though Ms. Ricca-Stroud had not claimed any inability to fully examine Dr. Lopez and his experts before the bankruptcy court or raised a procedural objection on appeal to the district court. *Id.*

4. Dr. Lopez appealed to the United States Court of Appeals for the Seventh Circuit. His position on the merits was, and is, that the district court's remand order constituted legal error. First, the bankruptcy court approached the valuation issue properly and consistently with the later *In re Prince* decision, assuming that *In re Prince* even applies outside the context of a

Chapter 11 proceeding. Second, even if Dr. Lopez's valuation were open to question, there was no basis for finding that Dr. Lopez made a false oath. To deny a discharge, the bankruptcy court must conclude that the plaintiff showed that the debtor knew his statement was false and made it with fraudulent intent. *See Beaubouef v. Beaubouef (In re Beaubouef)*, 966 F.2d 174, 178 (5th Cir. 1992); *Williamson v. Fireman's Fund Ins. Co.*, 828 F.2d 249, 251 (4th Cir. 1987). In this case, the district court could not and did not make such a finding, much less a finding that the bankruptcy court's determination was clearly erroneous. Instead, the district court ruled that Dr. Lopez lacked "the basic knowledge" needed to dispute a $500 valuation of his business; he reasonably relied on his accountants to value the business;[3] and, thus, "the record supports the bankruptcy court's factual findings and credibility determination with regard to the truthfulness of Dr. Lopez' oaths and his lack of reckléss intent." Pet App. 13a. Finally, Ms. Ricca-Stroud had raised no procedural irregularity warranting remand. No limitation had been imposed on her scope of cross-examination, no objection had been raised in the bankruptcy case to the scope of cross-examination and no issue had been raised in her appeal to the district court. As a matter of law, there was no basis for a remand.

5. The Seventh Circuit, in an opinion by Chief Judge Posner, dismissed the appeal for lack of jurisdiction. The court indicated that its position, dating back to 1984, has been that,

> even if the decision of the bankruptcy court is final, a decision by the district court on appeal remanding the bankruptcy court's decision for further proceedings in the bankruptcy court is not final, and so is not appealable to this court, unless the further proceedings contemplated are of a purely ministerial character, such as calculating prejudgment interest when the

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[3] An explanation that the debtor relied in good faith on professional advice in making his oath generally rebuts an inference of fraud. *See In re Mascolo*, 505 F.2d 274, 277 (1st Cir. 1974).

> amount of the judgment, the interest rate, and the period over which the interest is to be calculated are all uncontested.

Pet. App. 1a. The Seventh Circuit held that this was not a purely ministerial remand because it called for additional factual findings; thus, the Seventh Circuit lacked jurisdiction. *Id.* at 2a.

Even though the Seventh Circuit resolved this case easily under its precedent, it wrote to "reiterate this circuit's position [and] to invite the Supreme Court's attention to a persistent circuit split that only the Supreme Court can heal." Pet. App. 1a. The Seventh Circuit cataloged at length the circuit split concerning bankruptcy appellate jurisdiction. It cited minority cases dating back to 1982 that, it said, "allow an appeal from an order . . . remanding the case to the bankruptcy court if on balance the goal of an expeditious winding up of the bankruptcy proceeding will be furthered by allowing an intermediate appeal." *Id.* at 3a. But the court defended its own, more restrictive, standard as more consistent with the statutory language, the bankruptcy traditions, and the goal of simpler jurisdictional rules. *Id.* at 5a-6a.

REASONS FOR GRANTING THE WRIT

Since bankruptcy reform in 1978, the relationship between the levels of the court system has been one of the most critical, sensitive and hotly disputed issues in bankruptcy. *See, e.g., Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982). Bankruptcy is the only area of federal jurisdiction where one court decides a case, then the appeal runs through the district court before reaching the court of appeals. *See* 1 William L. Norton, Jr., *Norton Bankruptcy Law and Practice* § 17.01, at 17 n.4 (1991) (citing H.R. Rep. No. 95-595, at 41 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6002). Bankruptcy is unusual also because one case may encompass many different disputes and controversies. *Artoc Bank & Trust, Ltd. v. Apex Oil Co. (In re Apex Oil Co.)*, 981 F.2d 302, 304 (8th Cir. 1992).

Bankruptcy proceedings' unique nature has led courts to develop a flexible approach to determine when a matter is final

and thus appealable. "Virtually all decisions agree that the concept of finality applied to appeals in bankruptcy is broader and more flexible than the concept applied in ordinary civil litigation." 16 Charles Alan Wright *et al.*, *Federal Practice and Procedure* § 3926.2, at 270 (2d ed. 1996). This is true even of the majority rule cases.[4] The flexible bankruptcy finality rule thus causes some decisions even in those circuits to be considered "final" that would not in other contexts. *See id.* at 290. This "flexibility is required not only because some procedures and remedies are unique to bankruptcy but also because of the ways common procedures and remedies interact with administration of the entire proceeding." *Id.* Even though virtually all courts would thus expand the definition of finality in the bankruptcy field, the majority courts become improperly rigid in some cases such as this one where an appeal to the court of appeals would quickly and efficiently wrap up a bankruptcy proceeding.

The search for an appropriate standard "has been the subject of a fairly extensive debate." *In re Gould & Eberhardt Gear Mach. Corp.*, 852 F.2d 26, 29 (1st Cir. 1988). Commentators repeatedly have noted this continued judicial disagreement and have reached different conclusions about the proper rule.[5] This

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[4] *See, e.g., Pegasus Agency, Inc. v. Grammatikakis* (*In re Pegasus Agency, Inc.*), 101 F.3d 882, 885 (2d Cir. 1996); *Jove Eng'g, Inc. v. IRS* (*In re Jove Eng'g, Inc.*), 92 F.3d 1539, 1548 (11th Cir. 1996); *but see Farmers Home Admin. v. Buckner* (*In re Buckner*), 66 F.3d 263, 265 (10th Cir. 1995) (applying traditional finality standard in bankruptcy).

[5] *Compare* 16 Wright, *Federal Practice and Procedure*, § 3926.2, at 278-79 (approving form of minority rule) *and* Joseph Mitzel, Note, *When is an Order Final?: A Result-Oriented Approach to the Finality Requirement for Bankruptcy Appeals to Federal Circuit Courts*, 74 Minn. L. Rev. 1337, 1365-66 (1990) (same) *with* 1 *Collier on Bankruptcy* ¶ 5.09[1] (Lawrence P. King, ed., 15th ed. rev. 1997) (approving majority rule) *and* John P. Hennigan, Jr., *Toward Regularizing Appealability in Bankruptcy*, 12 Bankr. Dev. J. 583, 640-42 (1996) (same). *See also, e.g.*, Edith H. Jones, *Bankruptcy Appeals*, 16 T. Marshall L. Rev. 245, 253 (1991) (describing "elusive" quest for

case presents that issue, which is "hopelessly unresolved" in the courts of appeals.[6] The Court should grant the petition for certiorari to resolve the circuit split and to address the important jurisdictional question presented.

I. THE COURTS OF APPEALS ARE DEEPLY DIVIDED ON THE QUESTION OF WHEN THEY HAVE JURISDICTION OVER DISTRICT COURT ORDERS THAT DO NOT COMPLETELY DISPOSE OF BANKRUPTCY PROCEEDINGS

As Chief Judge Posner noted in seeking this Court's attention, this issue suffers from a "persistent circuit split that only the Supreme Court can heal." Pet. App. 1a. Eight courts of appeals have seemingly approved the rule applied in this case, restricting appeals to only those cases where the district court remands for purely ministerial actions:

> [A] decision by the district court on appeal remanding the bankruptcy court's decision for further proceedings in the bankruptcy court is not final, and so is not appealable . . ., unless the further proceedings contemplated are of a purely ministerial character, such as calculating prejudgment interest when the amount of the judgment, the interest rate, and the period over which the interest is to be calculated are all uncontested.[7]

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standard); Preston T. Towber, *A Uniform Approach to Determining Finality in Bankruptcy Appeals Under 28 U.S.C. Section 158(d)*, 29 S. Tex. L. Rev. 587, 588 (1988) (describing "jurisdictional quagmire").

[6] *Bonner Mall Partnership v. U.S. Bancorp Mortgage Co. (In re Bonner Mall Partnership)*, 2 F.3d 899, 903 n.9 (9th Cir. 1993) (quoting 1 *Collier on Bankruptcy* § 3.03[6][b], at 3-192 (Lawrence P. King, ed., 15th ed. 1992)), *cert. dismissed*, 513 U.S. 18 (1994); *In re Gould & Eberhardt Gear Mach. Corp.*, 852 F.2d at 29 (same).

[7] Pet. App. 1a; *see In re Gould & Eberhardt Gear Mach. Corp.*, 852 F.2d at 29; *DiCola v. American S.S. Owners Mut. Protection & Indem. Ass'n, Inc. (In re Prudential Lines, Inc.)*, 59 F.3d 327, 331 (2d Cir.

The other four circuits have adopted some form of a minority rule, allowing an appeal from a district court's remand in circumstances when an appeal would make the bankruptcy proceeding progress quickly and efficiently. Each adherent to the minority rule, however, has disagreed about its scope: in the minority courts, "no single formulation has emerged as canonical," according to Chief Judge Posner. Pet. App. 5a.

The Third Circuit

Following the landmark case of *Official Unsecured Creditors' Committee v. Michaels (In re Marin Motor Oil, Inc.)*, 689 F.2d 445 (3d Cir. 1982), *cert. denied*, 459 U.S. 1206 (1983), the Third Circuit "expansively interpreted the phrase 'final order'" in bankruptcy cases so that, when the bankruptcy court issued a final order and the district court issued an order affirming or reversing, the district court's order was also a final order that may be appealed. *Hammond v. Commonwealth Mortgage Corp. (In re Hammond)*, 27 F.3d 52, 55 n.5 (3d Cir. 1994). The Third Circuit invoked this rule even when the district court remanded to the bankruptcy court for further proceedings. *See, e.g., id. In re Marin Motor Oil* thus has been said to have allowed appeals of any district court order that reviewed a final bankruptcy order. *See* 16 Wright, *Federal Practice and Procedure* § 3926.2, at 277-79. Such a rule would plainly confer jurisdiction in this case.

However, in later cases, the Third Circuit has adopted a balancing test to determine whether appeals are appropriate. The court considers four factors in "balancing a general reluctance to expand traditional interpretations regarding finality and a desire to effectuate a practical termination of the matter." *Southeastern*

1995); *Department of the Air Force v. Carolina Parachute Corp.*, 907 F.2d 1469 (4th Cir. 1990); *Conroe Office Bldg. Ltd. v. Nichols* (*In re Nichols*), 21 F.3d 690, 692 (5th Cir.), *cert. denied*, 513 U.S. 962 (1994); *In re Buckner*, 66 F.3d at 265; *Clay County Bank v. Culton* (*In re Culton*), 111 F.3d 92, 93 (11th Cir. 1997); *In re St. Charles Preservation Investors, Ltd.*, 916 F.2d 727, 729 (D.C. Cir. 1990) (per curiam).

Sprinkler Co. v. Meyertech Corp. (In re Meyertech Corp.), 831 F.2d 410, 414 (3d Cir. 1987). Those factors are: (1) the impact on the bankrupt estate's assets, (2) the necessity for further factfinding on remand, (3) the preclusive effects of the court of appeals' decision on the merits on further litigation, and (4) whether judicial economy would be furthered. *Id.* The first factor — impact on the estate's assets — is most important. *Id.*; *In re Market Square Inn, Inc.*, 978 F.2d 116, 120 (3d Cir. 1992); *Porter v. Mid-Penn Consumer Discount Co. (In re Porter)*, 961 F.2d 1066, 1072-73 (3d Cir. 1992). The Third Circuit has explained its flexible rule by saying that "issues central to the progress of the bankruptcy petition, those 'likely to affect the distribution of the debtor's assets, or the relationship among the creditors,' should be resolved quickly." *Century Glove, Inc. v. First Am. Bank*, 860 F.2d 94, 98 (3d Cir. 1988) (quoting *Brown v. Pennsylvania State Employees Credit Union (In re Brown)*, 803 F.2d 120, 122 (3d Cir. 1986)). Under this rule, too, the court of appeals would have jurisdiction over Dr. Lopez's appeal because the issue at stake (whether he made a false oath) is the sole issue that will determine whether his debts will be discharged — and thereby the fate of the estate's assets — and the appeal could bring the entire bankruptcy proceeding to an end. *See, e.g., In re Meyertech*, 831 F.2d at 414 (asserting jurisdiction to decide proper damage measure, rendering remand order to recompute damage amount unnecessary).

The Ninth Circuit

The Ninth Circuit also applies a "pragmatic approach" to bankruptcy appellate jurisdiction, *Foothill Capital Corp. v. Clare's Food Market, Inc. (In re Coupon Clearing Serv., Inc.)*, 113 F.3d 1091, 1097 (9th Cir. 1997), that allows it to review cases that the majority rule courts would not hear. The Ninth Circuit has said that it considers four factors when deciding whether district court orders in bankruptcy are final: 1) the need to avoid piecemeal litigation; 2) judicial efficiency; 3) the systemic interest in preserving the bankruptcy court's role as the factfinder; and 4) whether delaying review would cause either party irreparable harm. *Stanley v. Crossland, Crossland,*

Chambers, MacArthur & Lastreto (In re Lakeshore Village Resort, Ltd.), 81 F.3d 103, 106 (9th Cir. 1996). The penultimate Ninth Circuit decision, *In re Lakeshore Village Resort*, insisted that these factors should be balanced on a case-by-case basis to determine whether the court of appeals could appropriately assert jurisdiction. 81 F.3d at 107.

The latest Ninth Circuit case, *In re Coupon Clearing Service*, implied that these factors are not to be balanced in each case but instead the factors inform the following rule: in remand cases, the court of appeals may assert jurisdiction if the issue is one of law and the appeal either 1) could end the case and obviate the need for factfinding, or 2) would materially aid the bankruptcy court in reaching its decision on remand. 113 F.3d at 1098; *Dominguez v. Miller (In re Dominguez)*, 51 F.3d 1502, 1506-07 (9th Cir. 1995); *Ernst & Young v. Matsumoto (In re United Ins. Management, Inc.)*, 14 F.3d 1380, 1384 (9th Cir. 1994).

Under Ninth Circuit precedent, the court of appeals would have jurisdiction over this case because the appeal concerns legal issues and could end the case and obviate the need for more factfinding. The appeal thus would promote the ends of judicial economy, would preserve the bankruptcy court's role as factfinder, and would prevent the harm that Dr. Lopez would suffer by waiting for the "fresh start" that is the goal of bankruptcy and the purpose of discharge.

The Eighth Circuit

Most recently, in *Stuart v. Koch (In re Koch)*, 109 F.3d 1285 (8th Cir. 1997), the Eighth Circuit said that it has traditionally considered three factors in determining bankruptcy finality:

> the extent to which (1) the order leaves the bankruptcy court nothing to do but execute the order; (2) the extent to which delay in obtaining review would prevent the aggrieved party from obtaining effective relief; (3) the extent to which a later reversal on that issue would require recommencement of the entire proceeding.

109 F.3d at 1287. While the court said, "[a]dmittedly, a district court order remanding the case to the bankruptcy court for further proceedings is not normally appealable," *id.*, it did not foreclose review of such cases. Instead, citing Ninth Circuit precedent, the Eighth Circuit indicated that it considers the policies of judicial efficiency and finality in deciding its jurisdiction. *Id.* at 1288.

As Judge Lay noted in dissent, *In re Koch* effectively adopted the minority rule over the majority standard. *Id.* at 1291-92 (Lay J., dissenting). Before *In re Koch*, some, but not all, Eighth Circuit panels reached results closer to the majority rule, as Chief Judge Posner noted below. Pet App. at 3a.

The Sixth Circuit

Two Sixth Circuit panels have adopted different views of this issue. In *Breyfogle v. Grange Mutual Casualty Co. (In re Gardner)*, 810 F.2d 87 (6th Cir. 1987), the Sixth Circuit adopted a more pragmatic approach. *See also Thompson v. Kentucky Lumber Co. (In re Kentucky Lumber Co.)*, 860 F.2d 674, 676 (6th Cir. 1988) (applying *In re Gardner*). The *In re Gardner* court rejected the majority rule and concluded that a remand order was appealable, relying largely on the fact that an appeal could end the entire case, rendering a remand unnecessary. *See id.* at 92. Under *In re Gardner*, the court of appeals could have jurisdiction over this case because the appeal could end the whole bankruptcy proceeding.

But in *SEOR, Inc. v. Textron Oil Corp. (In re Frederick Petroleum Corp.)*, 912 F.2d 850 (6th Cir. 1990), a later panel adopted what it called "a much-needed, bright-line test for determining finality," *id.* at 853-54, that it distinguished from the majority rule, the *Marin Motor Oil* rule, and its own prior position, *id.* at 852-53. It held that, for the court of appeals to have jurisdiction, the district court must enter a final judgment under Federal Rule of Civil Procedure 54(b):

> In other words, in the absence of certification by the district court as to the finality of a partial disposition, any partial

> disposition will be deemed non-final for the purposes of the exercise of appellate jurisdiction pursuant to Rule 54(b).

Id. at 853. The Sixth Circuit has not resolved the evident conflict between its cases.

Summary

Thus, "[t]here are both intra-circuit and inter-circuit disputes on this issue, leaving it unresolved."[8] Although Chief Judge Posner was uncertain whether the minority courts would have asserted jurisdiction here, Pet. App. 4a, the minority courts in fact would have done so. Those circuits would have heard this case because the issue on appeal concerned a legal issue that, if resolved in Dr. Lopez's favor, would have obviated the need for a remand, resolved all issues regarding Dr. Lopez's assets, and closed the bankruptcy proceedings entirely.

Consequently, the parties' ability to appeal may depend entirely on geographic happenstance, notwithstanding the Constitution's command that there be "uniform Laws on the subject of Bankruptcies throughout the United States," U.S. Const. art. I, § 8, cl. 4.[9] As one commentator has noted, "The attorney who litigates regularly in bankruptcy matters is often left without a clue as to what a circuit court of appeals and what a particular panel within that circuit court will do with an appeal."[10]

Nor is there any real prospect that this conflict will be resolved without this Court's intervention. The split in the courts has become more entrenched since the early 1980s, even though

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[8] 1 *Collier on Bankruptcy* ¶ 5.09[1]; *accord* Jones, *Bankruptcy Appeals*, 16 T. Marshall L. Rev. at 255.

[9] Mitzel, Note, *When is an Order Final?*, 74 Minn. L. Rev. at 1338-39 (noting that different appellate jurisdiction standards apply in bankruptcy cases arising in New York City and Newark).

[10] Towber, *A Uniform Approach to Determining Finality in Bankruptcy Appeals Under 28 U.S.C. Section 158(d)*, 29 S. Tex. L. Rev. at 591.

almost every court has explicitly noted the split,[11] and even though the issue is often presented to the courts of appeals. And this Court is unlikely to have frequent opportunities to resolve this circuit split because parties involved in bankruptcy often lack the resources or the incentive to petition for writ of certiorari in these circumstances.[12] To our knowledge, this issue has been presented to the Court on petition for writ of certiorari four times,[13] but the only one of these in the last nine years was the sketchy *pro se* petition in *Izen v. Nichols*, 513 U.S. 962 (1994). Thus, the Court has not fully been presented with the chance to resolve this conflict since it has become evident that the split is irreconcilable.

II. THE SEVENTH CIRCUIT'S DECISION WILL FRUSTRATE IMPORTANT BANKRUPTCY POLICIES

This Court has enunciated a concise definition of a "final" judgment in cases in which the district court acts as the factfinder and appeals are taken to the courts of appeals: a decision is "final" if it "ends the litigation on the merits and leaves nothing

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[11] *See, e.g., In re Gould & Eberhardt Gear Mach.*, 852 F.2d at 29 & n.2; *In re Pegasus Agency, Inc.*, 101 F.3d at 885; *In re Porter*, 961 F.2d at 1072; *Allegheny Int'l Credit Corp. v. Bowman (In re Bowman)*, 821 F.2d 245, 246-48 (5th Cir. 1987); *In re Gardner*, 810 F.2d at 91; Pet App. 3a; *In re Bonner Mall Partnership*, 2 F.3d at 904 n.9; *State Bank v. Anderson* (*In re Bucyrus Grain Co.*), 905 F.2d 1362, 1365-66 (10th Cir. 1990); *Barclays-American/Business Credit, Inc. v. Radio WBHP, Inc.* (*In re Dixie Broad., Inc.*), 871 F.2d 1023, 1028-29 (11th Cir.), *cert. denied*, 493 U.S. 853 (1989); *In re St. Charles Preservation Investors*, 916 F.2d at 728-29 & n.1.

[12] *Cf.* Jones, *Bankruptcy Appeals*, 16 T. Marshall L. Rev. at 246 ("The disincentives to appeal [in bankruptcy] are considerable.").

[13] *Izen v. Nichols*, 513 U.S. 962 (1994) (denial of certiorari); *Path-Science Lab., Inc. v. Greene County Hosp.*, 488 U.S. 820 (1988) (denial of certiorari); *L.B.G. Properties, Inc. v. Chisholm Realty Co.*, 479 U.S. 818 (1986) (denial of certiorari); *Drury v. Abdallah*, 476 U.S. 1116 (1986) (denial of certiorari).

for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233 (1945). The district court's decision here concededly is not final under this definition. But "the requirement of finality is to be given a 'practical rather than a technical construction,'" *Gillespie v. United States Steel Corp.*, 379 U.S, 148, 152 (1964) (quoting *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949)), to ensure "the achievement of the 'just, speedy, and inexpensive determination of every action.'" *Brown Shoe Co. v. United States*, 370 U.S. 294, 306 (1962) (quoting Fed. R. Civ. P. 1).

Thus, the bright-line finality rule stated above is subject to qualifications that respond to pragmatic concerns. The most familiar expansion of finality is the collateral order doctrine, which allows parties to appeal orders that finally decide collateral issues, even though the case will continue, when those issues are "too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen*, 337 U.S. at 546.

Additionally, in a number of specific contexts, this Court has applied a practical gloss to the definition of finality and has allowed review when orders do not meet the strict definition of finality. For example, as outlined in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), this Court has pragmatically construed 28 U.S.C. § 1257, which grants it jurisdiction over state courts' "final judgments or decrees." Also, because of the policies involved in official immunity, the Court has construed 28 U.S.C. § 1291 to further relax the collateral order doctrine in order to allow a defendant to appeal the district court's refusal to dismiss on claims of immunity. 15A Charles Alan Wright *et. al*, *Federal Practice and Procedure* § 3914.10, at 656 (2d ed. 1992); *see Johnson v. Jones*, 515 U.S. 304, 315 (1995) (acknowledging that Wright and Miller suggests that the Court has eased traditional finality requirements in this context).

Moreover, following *Sullivan v. Finkelstein*, 496 U.S. 617 (1990), some courts of appeals have begun to pragmatically view their jurisdiction over district court remands to administrative

agencies. Some appeals courts hear such cases when they could resolve important legal issues that would be effectively unreviewable after remand to the agency. Those courts note that this doctrine is similar to, but separate from, general pragmatic finality doctrines. *See Travis v. Sullivan*, 985 F.2d 919, 922 (7th Cir. 1993); *Travelstead v. Derwinski*, 978 F.2d 1244, 1247 n.7 (Fed. Cir. 1992).

Thus, in other areas of the law, courts have tailored finality requirements to specific needs and practices. In the bankruptcy context, too, virtually every court has established a more flexible view of finality based on bankruptcy's purpose and procedures. *See* 16 Wright, *Federal Practice and Procedure* § 3926.2, at 270. The Bankruptcy Code's purpose is to allow a debtor a "fresh start." *Stellwagen v. Clum*, 245 U.S. 605, 617 (1918). This goal is promoted by allowing the debtor to conclude his bankruptcy proceeding as quickly as possible, with finality and certainty. *See Katchen v. Landy*, 382 U.S. 323, 328 (1966); *In re Dominguez*, 51 F.3d at 1510 (quoting *Schunck v. Santos (In re Santos)*, 112 B.R. 1001, 1006 (B.A.P. 9th Cir. 1990)). Many bankruptcy rules are crafted with this goal in mind; indeed, courts are to interpret the Bankruptcy Code liberally in favor of the debtor. *Wright v. Union Cent. Life Ins. Co.*, 311 U.S. 273, 279 (1940). Almost every court agrees that this goal is best served by permitting appeals that may not be considered final in other contexts. *See* 16 Wright, *Federal Practice and Procedure*, § 3926.2, at 290. To promote the policy of judicial economy and quick resolution of bankruptcy matters, that flexibility should extend to grant appellate jurisdiction over cases such as this, where appeal of a legal issue could bring an end to the bankruptcy proceeding.

There are significant differences between bankruptcy appeals and ordinary civil appeals that justify a different approach in bankruptcy. As the minority courts have noted, "Many of the principal rationales for narrowly construing finality are based on an understanding of the proper relation between a trial court and an appellate court, and have less applicability when one appellate

court is asked to review what is in effect a lower appellate court."[14] In ordinary civil cases, the finality requirement "emphasizes the deference that appellate courts owe to the trial judge as the individual initially called upon to decide the many questions of law and fact," *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981), and the concern that trials should not be interrupted by forays to appeals courts, *see Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 430 (1985); *Cobbledick v. United States*, 309 U.S. 323, 326 (1940).

But in bankruptcy appeals, "the district court and court of appeals play identical roles. The court of appeals, therefore, is in as good a position to review the case as was the district court, and the sensitive relationship between trial and appellate courts, which is a factor underlying the policy of finality, is not implicated."[15] Further, in a case such as this where the bankruptcy court has concluded the proceeding, the traditional finality concern about interrupting the trial is not present; because the trial is already over, review by the court of appeals would aid the factfinder rather than disrupt the trial.[16]

This Court should grant the petition for certiorari to address the important question presented, to resolve a persistent circuit split, and to promote the Bankruptcy Code's policies.

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[14] *In re Marin Motor Oil, Inc.*, 689 F.2d at 449; *In re Porter*, 961 F.2d at 1072; *Sambo's Restaurants, Inc. v. Wheeler* (*In re Sambo's Restaurants, Inc*.), 754 F.2d 811, 814 (9th Cir. 1985).

[15] *In re Gardner*, 810 F.2d at 91; *In re Sambo's Restaurants*, 754 F.2d at 814; *see In re Bonner Mall Partnership*, 2 F.3d at 903-04 n.10 ("the integrity of the factfinding process" is not at stake in bankruptcy appeals, since court of appeals reviews district court's decision de novo).

[16] *See In re Sambo's Restaurants*, 754 F.2d at 815.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 25, 1997